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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 838

ARCH S. RHODES,

Petitioner,

vs.

THE FEDERAL LAND BANK OF ST. PAUL, A CORPORATION, AND FEDERAL FARM MORTGAGE CORPORATION, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT THE FEDERAL LAND BANK OF SAINT PAUL

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INDEX

	Page
Basis of Jurisdiction	1
Restatement of Issues	1
Reasons Why Writ of Certiorari Should Be Denied	2
Argument	3
1. Section 75(s)(3) of the Bankruptcy Act clearly provides that only such evidence as is submitted at a hearing to fix the value of property shall be considered in fixing the value thereof	3
2. The decision of the Circuit Court of Appeals herein does not conflict with the decision of any other Circuit Court of Appeals on the same matter; and it does not conflict with any applicable decision of the Supreme Court of the United States	4
3. The Circuit Court of Appeals has not decided herein an important question of Federal law which has not been settled by this Court	5
4. A conciliation commissioner's order fixing value under Section 75(s)(3) of the Bankruptcy Act is subject to review by the District Court. No error having been assigned as to the sufficiency of respondents' petition for review in either the District Court or on appeal to the Circuit Court of Appeals, its sufficiency is not now properly reviewable by this Court	7
Conclusion	8

INDEX TO AUTHORITIES CITED

CASES

Carter vs. Kubler, 320 U. S. 243	3, 4, 5
Equitable Life Assur. Soc. vs. Deutschle, 132 F. (2d) 525	3
General Talking Pictures Corp. vs. Western Electric Co., 304 U. S. 175	5
Kauk vs. Anderson, 137 F. (2d) 331	3
Moser vs. Mortgage Guarantee Co., 123 F. (2d) 423	3
Pfister vs. Northern Illinois Finance Corp., 317 U. S. 144	8
Rait vs. Federal Land Bank of St. Paul, 135 F. (2d) 447	7

RULES AND STATUTES

General Order in Bankruptcy 36, 11 U. S. C. following 53	4
General Order in Bankruptcy 47, 11 U. S. C. following 53	4
Rules of Civil Procedure 52	4
Section 39(c) of the Bankruptcy Act, 11 U. S. C. 67(c)	8
Section 75(s)(3) of the Bankruptcy Act, 11 U. S. C. 203(s)(3)	1, 2, 3, 7, 8
Section 240 of the Judicial Code, 28 U. S. C. 347	1

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BASIS OF JURISDICTION

This Court has jurisdiction under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

RESTATEMENT OF THE ISSUES

(a) Where a Conciliation Commissioner, in fixing value of property of a farmer-debtor after a hearing pursuant to Section 75 (s) (3) of the Bankruptcy Act (11 U. S. C. 203 (s) (3)), improperly considered evidence not submitted at such hearing, and upon petition by respondents for review of said order fixing value, the District Court found it

to be clearly erroneous and accordingly modified it, was the Circuit Court of Appeals correct in affirming the District Court on the ground that the value must be determined solely from the evidence adduced at the hearing, and that the use of evidence obtained in any other manner made the Commissioner's order clearly erroneous.

(b) Where the District Court, having found an order of a Conciliation Commissioner fixing value after a hearing pursuant to Section 75 (s) (3) of the Bankruptcy Act (11 U. S. C. 203 (s) (3)) to be clearly erroneous, proceeds to modify the order with respect to the value of the property upon the evidence before it, was the Circuit Court of Appeals correct in affirming the District Court on the ground there was ample supportive evidence.

REASONS WHY WRIT OF CERTIORARI SHOULD BE DENIED

1.

Section 75 (s) (3) of the Bankruptcy Act clearly provides that only such evidence as is submitted at a hearing to fix the value of property shall be considered in fixing the value thereof.

2.

The decision of the Circuit Court of Appeals herein does not conflict with the decision of any other Circuit Court of Appeals on the same matter; and it does not conflict with any applicable decision of the Supreme Court of the United States.

3.

The Circuit Court of Appeals has not decided herein an important question of Federal law which has not been settled by this Court.

4.

A Conciliation Commissioner's order fixing value under Section 75 (s) (3) of the Bankruptcy Act is subject to review by the District Court. No error having been assigned as to the sufficiency of respondents' petition for review in either the District Court or on appeal to the Circuit Court of Appeals, its sufficiency is not now properly reviewable by this Court.

ARGUMENT

1.

Section 75 (s) (3) of the Bankruptcy Act Clearly Provides That Only Such Evidence As Is Submitted At A Hearing To Fix the Value Of Property Shall Be Considered In Fixing the Value Thereof.

The decision of the Circuit Court of Appeals of which petitioner seeks review holds it clearly erroneous for a Conciliation Commissioner, in fixing the value of property after a hearing, pursuant to Section 75 (s) (3) of the Bankruptcy Act, to consider any evidence save that submitted at the hearing itself. The subsection is clear and concise:

> "The Court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, *and after such hearing, fix the value of the property, in accordance with the evidence submitted.* . . ." (Italics added.)

There is no uncertainty in the law as to the meaning of the above quoted provision. In *Carter vs. Kubler*, 320 U. S. 243, this Court stated that the valuation must be determined solely from the evidence adduced at the hearing. See, also, *Moser vs. Mortgage Guarantee Co.*, 9 Cir., 123 F. (2d) 423; *Equitable Life Assur. Soc. vs. Deutschle*, 8 Cir., 132 F. (2d) 525; *Kauk vs. Anderson*, 8 Cir., 137 F. (2d) 331.

The requirement that only such evidence shall be considered as is adduced at the hearing itself is in accord with the usual course of judicial proceedings. Each party is entitled to be present and to be apprised of all the evidence upon which a factual adjudication rests. Each party is entitled to an opportunity to examine, explain or rebut all such evidence. These are basic elements of a fair judicial hearing. *Carter vs. Kubler, supra.*

2.

The Decision Of the Circuit Court Of Appeals Herein Does Not Conflict With the Decision Of Any Other Circuit Court Of Appeals On the Same Matter; And It Does Not Conflict With Any Applicable Decision Of the Supreme Court Of the United States.

The applicable rule to be applied in a review of the referee's findings is clearly stated in General Order in Bankruptcy 47:

> "The judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report *or may modify it* or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." (Italics added.)

The applicable rule to be applied to findings of the District Court is clear. Under General Order 36 the Rules of Civil Procedure apply to bankruptcy proceedings. Rule 52 of the Rules of Civil Procedure provides:

> "Findings of fact shall not be set aside unless clearly erroneous."

Instead of any conflict with an applicable decision of this Court, the decision of the Circuit Court of Appeals herein is in accord with *Carter vs. Kubler*, 320 U. S. 243, wherein this Court said:

"Section 75 (s) (3) makes clear the impropriety of the conciliation commissioner's action. If the District Court conducts a hearing to determine the value of the property or if the conciliation commissioner is authorized to hold such a hearing, the statute provides that the valuation shall be fixed 'in accordance with the evidence submitted' at the hearing * * *. The valuation must thus be determined solely from the evidence adduced at the hearing and the use of evidence obtained in any other manner is improper. *Moser vs. Mtg. Guarantee Company, supra; Equitable Life Assurance Soc. vs. Deutschle* (C. C. A. 8), 132 F. (2d) 525, 52 Am. Bankr. Rep. (N. S.) 116. And the parties are entitled to a valuation based on a strict adherence to this orderly procedure."

The situation presented by the facts in the instant case is the same as in *Carter vs. Kubler, supra*, and the Circuit Court of Appeals cited and followed this Court's decision.

3.

The Circuit Court Of Appeals Has Not Decided Herein An Important Question Of Federal Law Which Has Not Been Settled By This Court.

The respondents submit that the important question of Federal law involved herein has been settled by this Court. The petitioner's petition and brief herein exhibit an attempt to have this Court, on a writ of certiorari, reconsider the facts. The major portion of petitioner's brief is devoted to argument on the relative qualifications of the witnesses, their interest in the proceedings, the weight to be accorded their testimony, and the relative consideration to be given sales of land in the vicinity of the petitioner's farm. Certiorari is not granted to review evidence. *General Talking Pictures Corporation vs. Western Electric Company*, 304 U. S. 175, 178:

> "There is nothing in the lower courts' decision on either of the added questions to warrant review here. Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. *Southern Power Co. vs. North Carolina Pub. Serv. Co.*, 263 U. S. 508, 68 L. Ed. 413, 44 S. Ct. 164; *U. S. vs. Johnston*, 268 U. S. 220, 227, 69 L. Ed. 925, 926, 45 S. Ct. 496. Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. *U. S. vs. Chemical Foundation*, 272 U. S. 1, 14, 71 L. Ed. 131, 142, 47 S. Ct. 1; *U. S. vs. McGowan*, 290 U. S. 592, 78 L. Ed. 522, 54 S. Ct. 95; *Alabama Power Co. vs. Ickes*, 302 U. S. 464, 82 L. Ed. 374, 58 S. Ct. 300. There is evidence to support them."

The Circuit Court of Appeals concurred with the District Court in the instant case, and said (R. 110):

> "Since the proceedings and order of the conciliation commissioner were 'clearly erroneous' on the ground stated, the only remaining question is whether the value fixed by the district judge was proper on the evidence. On that point, there can be no sound question, so far as our right of review extends in the matter."

Respondents submit that not only is petitioner's vehement argument of the facts not a proper basis for granting certiorari, but much of it is unwarranted by the record.

4.

A Conciliation Commissioner's Order Fixing Value Under Section 75 (s) (3) of the Bankruptcy Act Is Subject To Review By the District Court. No Error Having Been Assigned As To the Sufficiency Of Respondents' Petition For Review In Either the District Court Or On Appeal To the Circuit Court Of Appeals, Its Sufficiency Is Not Now Properly Reviewable By This Court.

Petitioner's motion in the District Court to dismiss respondents' petition for review was solely upon the ground that the District Court was without jurisdiction to review an order of the Conciliation Commissioner fixing value of property after a hearing pursuant to Section 75 (s) (3) of the Bankruptcy Act. The motion was denied upon this ground (R. 99, 100).

The sufficiency of respondents' petition for review was not raised in petitioner's motion to dismiss in the District Court (R. 91, 92) nor in his Statement of Points on appeal to the Circuit Court (R. 102, 103).

Respondents submit that the sufficiency of the petition for review is not now properly reviewable by this Court.

The law is clear that an order of the Conciliation Commissioner fixing value of a farmer-debtor's property pursuant to a hearing under Section 75 (s) (3) is subject to review by the District Court. In *Rait vs. The Federal Land Bank of Saint Paul*, 8 Cir., 135 F. (2d) 447, the Court said:

> "We have previously assumed that the right to review an order of the conciliation commissioner approving a reappraisal, or fixing the value of the property after a hearing, has always existed under the general provisions of subsection c of section 39 of the Bankruptcy Act, 11 U. S. C. A. 67, sub. c. . . . If there has heretofore been any real question in the matter which we have failed to recognize, it has now been sufficiently settled, we believe, against appellant's contention, by the expres-

sions in *Pfister vs. Northern Illinois Finance Corporation*, 317 U. S. 144. . . . We accordingly hold that, in a proceeding under section 75, sub. s of the Bankruptcy Act, an order of the conciliation commissioner approving a reappraisal made of the farmer-debtor's property, or fixing the value of the property after a hearing, properly is subject to review by the district judge. . . ."

In *Pfister vs. Northern Illinois Finance Corp.*, 317 U. S. 144, this Court held that all proceedings subsequent to the initial appraisal under Section 75 (s) of the Bankruptcy Act are subject to review under Section 39 (c) of the Bankruptcy Act, the Court stating:

"It is obvious that this proviso couched in terms of appeal, could not have been intended to control the review of the manifold activities of a commissioner engaged in handling an estate through three or more years of bankruptcy. To hold the proviso generally applicable would leave unregulated reviews of orders entered more than four months after the commissioner approves the appraisal. The section applicable to these reviews is §39 (c)."

Respondents submit that there appears no substantial reason or necessity for granting a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, and prays the petition be denied.

Respectfully submitted,

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